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In The
Supreme Court of the United States,
October Term, 1902.

THOMAS P. QUEENAN,
Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA,
Defendant in Error.
} NO. 246

Error to the Supreme Court
OF THE
Territory of Oklahoma.

SUPPLEMENTAL BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT.

Under permission of the court obtained, we submit, as supplemental to our original brief, the following, yet in doing so we have not the benefit of the supplemental brief and authorities on behalf of defendant in error.

To our assignment, pages 1, 2, and 3 of our original we add:

First: That the question before this honorable court for its determination, is not the sanity or insanity of the plaintiff in error, as it is, was he deprived by the ruling of the trial court of competent evidence that would tend to support his plea of insanity.

Second: It is manifest from the colloquy between the court and counsel, (page 24 P. R.), that the issue was, whether an

opinion formed since the facts were observed, and entertained at the time of the trial, was competent evidence.

Third: The defendant in error in his brief; page 2, upon this question contends:

> "That it is possible for the trial court to have excluded the evidence on other grounds than the one stated by us."

This statement is not supported by the record. The direct question was put by the court to the counsel,—if they were asking for the opinion of the witness at the time of the trial, etc. The court held this evidence to be incompetent. The rulingK of the court forestalled further action in the premises or further inquiry.

Again the contention by the defendant in error that the witness had not shown a sufficient acquaintance with the plaintiff in error; and that the facts upon which the opinion was called for were insufficient, is not tenable.

First: For the reason that it is the competency of the evidence and not its weight that is under consideration; (second) The OBJECTION DID NOT GO TO THE FACTS STATED BY THE WITNESS, or that the facts STATED BY HIM WERE INSUFFICIENT UPON WHICH TO BASE AN OPINION. No such objection was made or was in the mind of the court when the ruling was made. The facts observed were held competent, (P. R. 24)

II.

To our second we submit the following:

First: The question of guilt depended solely upon the condition of the mind at the time the act was committed. Only one instruction was applicable. If the wrongfulness of the act at the time of its commission was understood he was guilty, otherwise he was not.

Second: Where the instructions are contradictory or inconsistent with each other; or if they were calculated to confuse and mislead the jury, or if they must have left the jury in doubt or

uncertainty as to the law applicable, then the judgment should be reversed.

Sommers vs. Pamphrey, 24 Ind. 241.
Kirkland vs. State, 43 Ind. 154.

Third: An objectionable instruction cannot be corrected by other instructions which are not objectionable, nor can an erroneous instruction be corrected by one not erroneous.

Guetig vs. State, 63 Ind. 282.
65 Calf. 129.

Fourth: It is important that the deliberations of the jury be not influenced by an improper instruction.

Shaw vs. The People, 81 Ill., 151.

Fifth: The language of the instructions ought to be unambiguous, directand comprehensible by persons not educated in the law,—such as the men addressed will understand.

Bish. Crim. Pro., Vol 1, 3 Ed., Sec. 980.

And authorities cited under reference 7. And will be treated as erroneous if liable practically to mislead.

It is admitted by defendant in error, (page 6 of brief), that the instruction complained of may require a higher Standard of insanity than is required by the statute of Oklahoma, and that they go to opposite extremes, and while the last four lines of the fifth instruction are prejudical they should be considered as a whole and thus considered there was no error.

He does not deny but what they are confusing distinct propositions, contradictory and inconsistent, and from his admissions, if we keep the rule in view, it is impossible to relieve them of ambiguity so as not to confuse and mislead. The men addressed should understand them, otherwise they are erroneous.

An analysis of the fifth instruction, means that if he knew and understood that it was wrong and if he was able to know and understand the consequences of the act, he was guilty of murder; or, as an affirmative proposition, if the jury should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the conse-

quences of such act, then they should find the defendant not guilty. A condition not warranted by the law and burdensome before he could be acquitted.

Here we have two opposite instructions seeking to define the mind's responsibility. Which one was the jury likely to adopt? If either was objectionable the inquiry ends and by the rule the judgment should be reversed.

Ignorance of the act as being wrongful and not an ignorance of the mere act itself or its consequences, is the legal test. A man could know that he was taking life and have capacity enough to understand its physical nature, and at the same time be unconscious that he was committing a crime.

U. Bigelow vs. Ins. Co., 3rd Otto 228.

In Winston vs. U. S., Vol. 172, page 313, the trial court enlarged upon the law by instructing that the act of Congress, providing in cases of murder that the jury could add to their verdict "without capital punishment," was intended to apply to cases where there were palliating or mitigating circumstances. This was held to be an enlargement upon the statute.

In the case at bar the statutory test applies to a mental incapacity of the wrongfulness of the act at the time the act was committed, which is not to be destroyed or neutralized by a capacity manifested subsequent to the act.

Sec. 1852 Okla. Stat. of 1893.

On pages 338 to 341 of the transcript it is shown that plaintiff in error, immediately upon committing the act, leaped through the window to the pavement below, carrying with him glass, sash and all in his fall, and which seriously disabled him.

Standard authors upon insanity teach us that great shocks produce insanity, and per contra, great shocks restore the mental balance, and we respectfully submit that the shock received could have restored his mental equilibrium and make him understand what he had done, even though he did not know at the time of the act that he had committed a wrong.

There was no motive for the crime except that shown by his mental condition. His mental condition was frequently the sub-

ject of discussion between his wife and members of his family, P. R. 21. They were a very affectionate couple, and a disturbance between them was never heard of, P. R. 14. He was a great sufferer from physical disease and for the past few months prior to the homicide complained of his head as well. The physical disease and its effect upon the system, being a chronic necrosis of the bone and a disturber of the nerve centers, Tr. 559 to 564.

From the foregoing we deduce the following—that no man ever harmed the woman he loved when sane. Physical disease is one of the primary and producing causes of insanity.

Immediately upon his fall to the ground the doctor and others got to him and in answer to their questions said go to his wife and baby; he had killed them, Tr. 337. The child was unharmed, yet in his hallucination he thought he had killed it as well. He imagined that he had shot it when nothing of the kind had happened. Suffering from a perversion of the disease, he entertained a false idea, a wrong impression. Insane people can have memories. Insanity is a condition of a diseased brain, which manifests itself by disordered or perverted sensations or feelings or by disordered or perverted ideas, actions or impulses.

After plaintiff in error recovered from his fall, by the language used, he seemed to know that he was not hurt himself while in fact he was, he seemed to know that he had killed his wife, and the fact was that he had. These matters are referred to, to direct attention to the fact that the instructions were harmful and enabled the jury to find that as he comprehended after the fall the consequences of his act he necessarily understood the wrongfulness of it at the time of its commission.

This issue was sharply drawn in the trial court by the special instructions asked and refused, Brief page 7.

The Eighth instruction, P. R. page 26, were not excepted to, yet we beg the pardon of the court if we suggest that if stripped of every other objection, it is seriously objectionable in limiting and restricting the jury to matters "against his interest" in determining the condition of his mind at the time of the act. We are taught that declarations, acts and conversations, if res gestæ, whether for or against, are admissible. But the particular

vice in the instruction referred to is that the attention of the jury was thereby called to the fact that he was conscious of the consequences of his act as shown in his declarations to the physician, and understanding the consequences it necessarily embraced the capacity to have known that the act was wrongful—in opposition to the statute of Oklahoma which says that if he was incapable of knowing its wrongfulness merely he was excusable.

III.

We desire to add to our third assignment, which begins at page nine of the brief, the following:

Was the jury that tried plaintiff in error a legally constituted jury?

The court will pardon our insistence in this matter and permit us to direct its attention to the fact that in so far as our investigations have permitted us we have been unable to find a case like the one at bar on this point.

The disqualification complained of is one directly associated with criminality, and unlike the causes referred to in Kohl vs. Lehlback, 160 U. S., 432, and the case in Vol. 187, page 159.

The mischief in this case is that a person was put on the jury who was in fact an outlaw, and neither by the action of waiver on the part of the defendant or acquiesence on the part of the court could he be qualified.

It has been held by good authority that the grand jury with one or more unqualified members is an illegally constituted body, and its presentments void.

Dovey vs. Hobson, 6 Taunton, 460.
U. S. vs. Wilson McLean, 610.
Commonwealth vs. Parker, 2 Pickering, 550.
Commonwealth vs. Doyle, 17 Ohio, 225.

In Commonwealth vs. Doyle the court says: "No objection can come too late which discloses the fact that a person has been put to answer a crime in a mode violating his legal and constitutional rights. The doctrine of waiver has nothing to do with criminal prosecutions. No person can be put upon his defense on the charge of crime or be convicted of crime except in the

exact mode prescribed by law, and whenever it shall be made manifest in the progress of a criminal prosecution that the legal rights of a person charged have been violated the court will permit the accused to have the benefit of the error. * * * It must be admitted that the juror was incompetent if the accused had spoken in time. How can his silence make him competent when he was not so by law? It is not the accused that makes the juror, but the statute."

We respectfully ask, can an accused, by his consent or will, constitute a juror?

What was the remedy?

Section 5177 Okla. Stat., says the court for good cause shown may permit a juror to be challenged after he is sworn to try the cause, *but not after the testimony has been partially heard. If this statute is permitted to mean what it says*, then we ask what right had the defendant to challenge a juror when his disqualification was suggested? If he had not the right under the statute to move his disqualification, how did his silence or his lack of legal right to challenge waive the disqualification?

The court should have declared a mistrial.

In the circumstances confronting the court it was the duty of the court to have discharged the jury and declared a mistrial. Under our view of the case the juror being a nullity jeopardy had not attached. "The jeopardy spoken of in the Fifth amendment of the constitution can be interpreted to mean nothing short of the acquittal or conviction of the person. This was the meaning affixed to the expression by the common law."

4 Wash. Cir. Ct. 410.

In Com. vs. McCormick, 130 Mass., 62, the court says:

"Whenever the case cannot be proceeded with by reason of some physical or moral necessity arising from no fault or neglect of the government the trial may be stopped and defendant afterward tried upon the same indictment. Such interference is necessary to prevent great injustice to one side or the other. The power is to be used alike for the protection of the prisoner in his right to an impartial trial."

In the case of Simmons vs. the U. S., Vol. 142 U. S. 148, in the opinion delivered by Mr. Justice Gray, it is held—to be the duty of the court to have declared a mistrial because of the disqualification of one of the jurors discovered during the trial. In that case the cause simply effected the bias of the juror, and we submit that the case at bar presents a much greater difficulty for the jury to act with the independence and freedom requisite to a fair and impartial trial.

We respectfully invite the careful attention of this court to that opinion and the authorities there cited, and also to the opinion in U. S. vs. Morris, 1 Curtis C. C. 23. It seems to us that the views announced by Mr. Justice Gray and those of Mr. Justice Curtis upon the question we here present are unanswerable.

A discharge of the juror was the right of the court and in any matter where the right exists duty is apparent. The accused was entitled to it. It was the duty of the court to direct the remedy and persue it. If we are answered that the statute of Oklahoma prevented such action, then we reply that the defendant was thereby prevented. Be that as it may, the way was open to the trial court whether the defendant consented or not, because under the law it was the duty of the court to see that a fair and impartial trial as well as a legally constituted jury was impaneled.

We have been unable to find any decision from this court calling into question those referred to and now presented in the case at bar.

We respectfully ask, how can there be an impartial trial or an impartial jury with one member thereof a convict? If one member is a felon and the jury is legally constituted then upon the same principle twelve felons could have escaped the penitentiary and come into this new country, and for fear of disclosing their identity, qualify in form and thus make themselves by force of perjury citizens rehabilitated in the full garb of honest and legal elligibility, without power in the courts to remedy the wrong.

The matters presented in our original brief supplemented by those now sumbitted, we hope will receive consideration and

the erorrs appearing will warrant a reversal and remanding of this cause.

Respectfully submitted,

J. W. JOHNSON,
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H. H. HOWARD,
STILLWELL H. RUSSELL,
For Plaintiff in Error, Thomas P. Queenan.